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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91177036
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Nationstar Mortgage, LLC,

Opposer,

v.

Mujahid Ahmad,

Applicant.

Attorney Docket No. 0055673-000033

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Opposition No. 91177036

OPPOSER'S REPLY BRIEF

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October 11, 2011

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Upon examination of Applicant's points and authorities, it is clear the present opposition may be sustained on multiple grounds but that under no circumstances may the opposed mark be permitted to register. Opposer has priority in the disputed mark at least as early as March 31, 2006, prior to the filing date of the opposed application, and is entitled to judgment even assuming the authenticity of Applicant's evidence and the credibility of his testimony.

If the opposed application is adjudicated under Section 1(a) of the Lanham Act, then Applicant's alleged use of his mark in 2005, even if it occurred, was *de minimis* and insufficient to establish priority under Lanham Act Section 1(a). If, alternatively, the application is adjudicated under Section 1(b), then Applicant's activities prior to the filing date of the opposed application are insufficient under established precedent to show a *bona fide* intent to use. In either event, Opposer's priority is at least as early as March 31, 2006, before the filing date of the opposed application. Opposer's priority date therefore precedes any date that can be ascribed to Applicant even granting the benefit of every doubt to Applicant in relation to the disputed issues of fact. Applicant's trial brief fails to overcome these flaws, even assuming the authenticity of the home-made business cards and advertising material allegedly distributed to Messrs. Hussain and Sharieff in 2005, and even if the testimony of Applicant and his witnesses is credited in its entirety.

The Board is not required to resolve doubts in favor of Applicant about the authenticity of Applicant's home-made business cards and advertising material allegedly distributed in 2005, considering the conflicts and improbable assertions in the testimony of Applicant and his

witnesses.¹ However, resolving these doubts in Applicant's favor would allow for the adjudication of this opposition in Opposer's favor without requiring a finding that Applicant and his witnesses have willfully given false evidence and testimony.

Nobody but Applicant and his witnesses can ultimately know whether a home-made business card or advertisement displaying the disputed mark was truly given by Applicant to Messrs. Hussain or Sharieff in 2005. On this basis Applicant makes a creative distinction between the facts of the present case and *Doctor Vinyl & Associates v. Repair-It Industries, Inc.*, 220 USPQ 639 (TTAB 1983), where the Board discredited the testimony of the applicant and his witnesses in its entirety after finding that the applicant had fabricated documents to support his assertion of priority. As pointed out in Applicant's trial brief, there is a theoretical *possibility* that a home-made business card or advertising flier bearing the Nationstar name *could* have been created by Applicant on his personal computer in 2005 and *could* have been given to Messrs. Hussain or Sharieff, and in that sense *could* have actually existed.

It is a poor testament to Applicant's position that the credibility of his evidence depends on a theoretical possibility. Nevertheless, the Board may avoid a finding in regard to the authenticity of Applicant's home-made business card and advertising material, because even

¹ For example, Abid Hussain contended that he just happened to have Applicant's business card in his wallet, some six years since it was given to him, the day he was visited by Applicant's counsel. However, as illustrated in Opposer's trial brief, Mr. Hussain is a close friend of Applicant and knows his telephone number by heart. On cross-examination Hussain rendered his testimony even more ridiculous by claiming that he carries Applicant's card in his wallet on some days and not others. Applicant states in his trial brief that the "presence or absence of applicant's business card in Hussain's wallet is irrelevant to the issues of this opposition." Applicant's Brief at 15. On the contrary, the issue is relevant not only to the *existence* of that business card but to Mr. Hussain's *credibility*.

assuming the authenticity of such evidence and the veracity of Applicant and his witnesses, the opposition must be sustained for three basic reasons:

(1) Under Section 1(a) of the Lanham Act, there is no evidence that Applicant first used the disputed mark in commerce; and, if such use had occurred, it would have been in violation of state and local licensing requirements. In fact there is no evidence that Applicant has *ever* used the mark in commerce, much less that he has *continuously* used the mark in commerce as would be necessary to establish priority under Section 1(a).

(2) Under Section 1(b) of the Lanham Act, Applicant's presentation of a spurious business card and advertising material to Messrs. Hussain and Sharieff in 2005 would not, without more, suffice to establish a *bona fide* intent to use the disputed mark, at least in the absence of any application for regulatory approval or other preparatory activity that would ordinarily and necessarily precede the commencement of commercial activity under that name.

(3) Even assuming that Applicant had a good faith intent to use the disputed mark as of his filing date on April 20, 2006, that date was preceded by Opposer's public pre-sales activity involving the exposure of the disputed mark to Opposer's class of customers at least as early as March 31, 2006

I. There is No Evidence That Applicant First Used the Disputed Mark in Commerce, or That Any Such Use Has Been Continuous and Substantial as Required Under Section 1(a).

As discussed in Opposer's trial brief, Applicant has consented to the trial of this opposition on the basis of Section 1(a). In his trial brief Applicant continues to argue that he has

used the disputed mark "continuously" from 2005 to the present.² For purposes of priority under Section 1(a), however, Applicant's position is deficient for the following reasons.

A. There is No Evidence That Applicant *First* Used the Disputed Mark in Commerce.

There is no evidence in the record of "Nationstar" used by Applicant in commerce prior to Opposer's first use of the disputed mark as early as March 31, 2006, as all or part of any trade name, trademark or service mark. On the contrary, the record indicates that Applicant was engaged as a licensed real estate agent for First American Real Estate, Inc., of Falls Church, VA.

Documents which would have disclosed Applicant's commercial use of the name "Nationstar" in 2005, had it ever occurred, instead display the name "First American Real Estate." This includes Applicant's Certificate of Sales Performance in 2005, issued by the Northern Virginia Association of Realtors;³ Applicant's IRS Form 1099 for 2005;⁴ Applicant's IRS Form 1099 for 2006;⁵ the Metropolitan Regional Information System (MRIS) Print-out, listing real estate transactions in which Applicant participated, totaling 14 transactions between January 1, 2004 and December 31, 2010;⁶ and the HUD-1 Statement, dated March 24, 2005, documenting Applicant's participation in a purchase of property by Abid Hussain.⁷

² "Not only does Mr. Ahmad have a *bona fide* intent to use the NATIONSTAR mark, he has used the mark *continuously* since the beginning of 2005." Applicant's Brief at 30 (emphasis added).

³ Exhibit 1 to Deposition of Mujahid Ahmad at pp. APP00013, appended to Opposer's trial brief as Exhibit 15.

⁴ *Id.* at p. APP00014, appended to Opposer's trial brief as Exhibit 16.

⁵ *Id.* at p. APP00015, appended to Opposer's trial brief as Exhibit 17.

⁶ *Id.* at p. APP00044, appended to Opposer's trial brief as Exhibit 23.

⁷ *Id.* at p. APP00062 - APP00063, appended to Opposer's trial brief as Exhibit 24.

Applicant nonetheless continues to assert that the real estate transactions in which he participated as a licensed agent for First American Real Estate should be credited to his "commercial use" of the Nationstar name. Applicant's Brief at 8. His allegation of priority based on first commercial use must therefore be rejected.

B. There is No Evidence That Applicant Has *Ever* Used the Disputed Mark in Commerce.

Applicant created a Virginia corporation, Nationstar Mortgage, Inc., on May 19, 2006, one month after filing the opposed application.⁸ This corporation has never been authorized to engage in real estate agency in the Commonwealth of Virginia or any other jurisdiction. Applicant first contended that he did not know whether the corporation had ever earned any income even though he is the president and sole representative of the company.⁹ However, he conceded that the corporation has never filed a federal or state tax return¹⁰ and finally admitted that the company has never done any business.¹¹ This fact is confirmed by a report dated May 12, 2010, from the Business Tax Division of the Commissioner of Revenue for Arlington, County, Virginia, attesting that Applicant has "not registered the trade name NationStar or Nation Star. . . [and that] there is no business tax registration for this individual."¹²

⁸ See Exhibit 5 to Testimony Deposition of John D. Socknat, also introduced by applicant as Exhibit 1 to his Testimony Deposition at p. APP00045, appended to Opposer's trial brief as Exhibit 31.

⁹ *Id.* at 79-80.

¹⁰ *Id.* at 81.

¹¹ *Id.* at 82.

¹² See Exhibit 6 to Testimony Deposition of John D. Socknat, appended hereto as Exhibit 36.

C. There is No Evidence That Applicant Has *Substantially and Continuously* Used the Disputed Mark in Commerce.

Contrary to the evidence, Applicant asserts that he has been "continuously" engaged from 2005 to the present in commercial activity using the Nationstar name. Applicant's Brief at 30. Applicant might have argued instead that his intention to use the Nationstar name in commerce was interrupted by the Notice of Opposition and that his plans to use the name had been suspended pending the outcome of this proceeding. Indeed Applicant amended the filing basis for the opposed application from Lanham Act Section 1(a)(actual use), to Section 1(b) (intent to use). However, that is not what Applicant or his witnesses asserted in their depositions, or what Applicant has argued in his brief. Instead Applicant insists not only that he first used the mark in commerce in 2005, but that he has been using it "continuously" since then. Applicant's Brief at 30.

The lack of credibility in Applicant's assertion of *continuous and substantial* commercial use reflects his lack of credibility in general, including his assertion of *first* commercial use. However, even granting every benefit of the doubt to Applicant regarding the credibility of his evidence, there *is* no evidence, credible or otherwise, that Applicant has used the disputed mark *substantially and continuously* so as to support registration under Section 1(a). He admits that his Virginia corporation, Nationstar Mortgage Inc., has never earned any income, never hired any employee, never rendered any payment, never opened a checking account, never filed a federal or state tax return, never listed the name of his company in a local telephone directory, and that his only sales are those in which he participated as a licensed salesperson for First American Real Estate. The Board may sustain the opposition on this ground alone.

II. There is No Evidence That Applicant Had a *Bona fide* Intent to Use the Disputed Mark in Commerce at the Time He Filed His Application.

Even assuming the authenticity of Applicant's home-made business cards and advertising material, the private presentation of such business cards and material to Messrs. Hussain or Sharieff in 2005 would not suffice to establish a *bona fide* intent to use the Nationstar name prior to Opposer's first use of the name at least as early as March 31, 2006. This is particularly true in the absence of such preparatory measures, *e.g.*, application for regulatory approval, as would be ordinary and necessary to commercial use of the disputed mark.

A. Failure to Seek Regulatory Approval

Applicant's trial brief misconstrues Opposer's position regarding the need for regulatory approval prior to the offer or sale of real estate agency and mortgage brokerage services. *See* Applicant's Brief at 19-22, 27-29. Applicant refers to the "fundamental unfairness of [] allowing such testimony in circumstances where judgment of guilt under criminal statutes is rendered by the Opposer's paid contractor, an inappropriate standard of proof has been applied, and no defense is permitted." *Id.* at 19. However, Opposer has not "attacked" Applicant for the illegality of his commercial activity in 2005 as claimed by Applicant in his trial brief. *Id.* at 15. Opposer has merely illustrated that such activity, had it truly occurred, *would* have violated state law and therefore cannot support a claim of priority. Opposer's expert testimony further undermines the credibility of Applicant's claim to having possessed a *bona fide* intent to use the disputed at any time prior to Opposer's first use of the disputed mark at least as early as March 31, 2006.

In short, it is reasonable to believe that if Applicant had intended to use the disputed mark in commerce at any time before Opposer's priority date of March 31, 2006, Applicant being knowledgeable of regulatory requirements because of his experience as a licensed real estate

salesperson for First American Real Estate, Applicant would have sought regulatory approval for use of the disputed mark at that time.

Thus, Applicant misses the point in stating that "Opposer did not show any illegal use of the NATIONSTAR trademark by Mr. Ahmad." Applicant's Brief at 27. Opposer *agrees* that there was no commercial use of the NATIONSTAR by Mr. Ahmad at any time - legal *or* illegal - and is merely pointing out that any such use *would have been illegal* had it actually occurred.

In his trial brief Applicant argues that not *all* of the services identified in the opposed application would have required regulatory approval. *See* Applicant's Brief at 9-10.¹³ However, the only evidence that Applicant intended to use the Nationstar name in connection with *any* of those services are the home-made business cards and advertising material allegedly distributed by Applicant in 2005. These materials unambiguously purport to advertise real estate agency and mortgage brokerage services, which uncontrovertibly *do* require regulatory approval.

As Applicant's position boils down to an assertion that not *all* of the services he was advertising required regulatory approval, the testimony on this point by Opposer's expert, John D. Socknat, warrants careful review:

Q. Is this a copy of a business card?

A. That appears to be what it is.

Q. We have the name Nationstar Real Estate here. Is there any interpretation of the law that would allow for this kind of usage of a name without regulatory approval?

A. To use Nationstar either an entity would have to be in existence that went by the name of Nationstar and/or some sort of fictitious name or trade name or d/b/a of at a minimum Nationstar.

¹³ The opposed application identifies the following services: "real estate brokerage; rental of real estate; real estate management services, namely, management of commercial and residential properties; real estate investment; residential and commercial property and insurance brokerage; mortgage brokerage; and business finance procurement services."

- Q. But what if the person was not actually engaged in any commercial transactions? What if he was just giving cards like this out in an effort to solicit transactions? Does that require regulatory approval?
- A. In my opinion it does.
- Q. Please turn to page 29 within Exhibit 4. Do you see the use of the name Nationstar Mortgage, Inc. here?
- A. I do.
- Q. And at the top it says One Stop for all your Real Estate Needs. Buying. Selling. Refinancing. Do you see that?
- A. I do.
- Q. In your opinion is there any interpretation of the applicable laws that would allow for this kind of commercial use without regulatory authority?
- A. No.
- Q. Now, turning forward to page 36 within Exhibit 4 we see that pages 36 to 43 are substantially identical copies of a direct mail solicitation.
- A. Yes.
- Q. It says: Nationstar Mortgage, Inc. assists its customers in the purchase of Residential, Commercial and Land properties. If you are interested in buying a new property or want to refinance your current property, please feel free to contact us by e-mail or call us at this telephone number to assist you in either transaction. Do you see where it says that?
- A. I do.
- Q. Now, we don't really know from this letter exactly what kind of assistance Mr. Ahmad has in mind. Isn't that true?
- A. Correct.
- Q. The reason I am asking this is because I am trying to put myself into the shoes of the cross examination. Conceivably the assistance might be transportation. Perhaps Mr. Ahmad gave a ride to somebody from that person's house to the mortgage broker's office. That conceivably could be assistance, right?
- A. Anything is possible. I read this as offering up real estate brokerage and mortgage brokerage or -- you can't sort of tell from the context -- or mortgage lending services because there is a solicitation specifically for buying of a new property. That type of services would require a real estate brokerage license to

represent someone in the acquisition. Similarly for a refinance either acting as a mortgage broker or a mortgage lender for the refinance, as a general rule will require licensure as a mortgage broker and/or lender. Without the context of knowing specifically we don't know if this particular individual is residential or commercial, but the solicitation is broad enough to say and reference ability to assist for residential, commercial and land, and by inclusion of residential in particular that pulls in the mortgage banking solicitation and statute and then the commercial and land, of course, would pull in the real estate broker statute.

Q. Okay. Thank you. Now I am looking at the second paragraph here. I will read this out loud. Quote. "We can help you with multiple loan options available to you in today's market, such as home equity line of credit, interest only loan, no down payment with 80/20 program, full documentations, limited or not documentation loan and stated income loans." End quote. We don't know exactly what Mr. Ahmad means by the word help here, do we?

A. We don't.

Q. So, he could be making a peanut butter sandwich for the individual and saying there you go, now you are not going to go into this transaction hungry, lots of luck. But is it reasonable to conclude that maybe Mr. Ahmad did not need regulatory approval for this kind of activity because maybe all he was doing was giving somebody a ride or making a peanut butter sandwich for that person, so maybe he didn't really need regulatory approval to distribute this kind of solicitation? Is that a reasonable interpretation in your view?

A. It is not.

Deposition of John D. Socknat, Transcript at p. 114-120, appended as Exhibit 28 to Opposer's Trial Brief.

B. Applicant's Lack of *Bona Fide* Intent to Use the Disputed Mark is Evidenced by His Unreasonable Settlement Demands.

As pointed out in Opposer's brief, the unreasonable position of a party in settlement communications may be construed by the finder of fact as evidence of bad faith. *See, e.g., Bright Beginnings, Inc. v. Care Comm, Inc.*, 78 F.3d 592, at p. *4, 1996 WL 82455 (Table) (9th Cir. 1996)(holding that party acted in bad faith by inserting \$300,000 cash demand into a settlement agreement that had included no monetary payment). While settlement negotiations may be inadmissible under certain circumstances pursuant to Rule 408 of the Federal Rules of Evidence,

Applicant opened the door to an inquiry into the reasonableness of his settlement position by amending the opposed application to a Section 1(b) filing basis and thereby raising an issue regarding the *bona fides* of his intent to use the opposed mark.

In his trial brief Applicant states that Opposer has "trie[d] to create a suspicion that Mr. Ahmad was trying to enrich himself at the Opposer's expense."¹⁴ Applicant states, "At no time did Mr. Ahmad demand \$50,000, \$500,000, \$5,000,000 or any other amount from the Opposer in exchange for his trademark application."¹⁵ This statement, however, is contradicted not only by Applicant's deposition testimony acknowledging the receipt of an offer for \$30,000,¹⁶ but by the memorandum from Applicant's counsel dated April 14, 2009, appended hereto as Exhibit A. In that memorandum Applicant's counsel states:

Mr. Ahmad has finally come up with a counteroffer to settle this matter. His counteroffer is \$2 million.

See memorandum dated April 14, 2009, from Patrick Rea to Lloyd Smith appended hereto as Exhibit A (emphasis added).

C. Applicant's Ownership of Unused Domain Names Containing the Nationstar Name Cannot Without More Establish the Good Faith of Applicant's Alleged *Bona Fide* Intent to Use That Name in Commerce.

Applicant cites his registration of two domain names containing the name "Nationstar" in 2005 as evidence that he had a good faith intent to use that name in commerce. See Applicant's Brief at 30. Applicant, however, concedes that there was no content at the websites

¹⁴ Applicant quotes Opposer's brief, where Opposer stated, "'While he was unable to assign a value to his alleged mark and denied that he demanded a \$500,000 payment from Opposer as remuneration for his assignment of any claim, Applicant acknowledge his receipt of an offer for \$30,000 from Opposer's counsel.'" Applicant's Brief at 13, quoting Opposer's Brief at 22.

¹⁵ Applicant's Brief at 13.

¹⁶ Deposition of Mujahid Ahmad, Transcript at 204.

corresponding to those domain names, and that Opposer obtained confirmation from the Virginia Department of Professional and Occupational Regulation (DPOR) and other sources that Applicant had made no commercial use of the Nationstar name. *Id.*¹⁷ Applicant concedes that he never used these websites, or any other domain name or website, for the *bona fide* offer or sale of any goods or services at any time prior to the date of the opposed application.¹⁸

Applicant also concedes that he owns, or has owned, multiple Internet domain names, including but not necessarily limited to the following additional 42 names, none of which has ever been used for the offer or sale of any good or service:¹⁹

autosnatch.com	greenstartaxi.com	megastartv.net
autosnatcher.org	greenstartaxicab.com	mujhi.com
barzilla.net	kabobcafe.com	mujhi.net
cavacoffee.com	makclassicmovies.com	nationstar.net
cawacoffee.com	makcm.com	nationstar.org
dryfruitsonweb.com	makentertainment.net	nationstarrealestate.com
envirocab.net	makmovie.com	nationstarrealestate.net
envirocab.org	makmovies.com	nationstarrealty.com
gogreencab.net	makonee.com	nationstarrealty.net
gogreenlimo.net	makoneentertainment.com	parinda.net
gogreentaxi.org	makrealestate.net	parwaaz.com
gogreentaxicab.com	makrealestate.org	parwaaz.net
gogreentaxicab.net	makstars.com	
greenstarcab.com	maktv.net	
greenstarlimo.com	makys.org	

Applicant's failure to use any of these domain names for the offer or sale of any good or service not only rebuts a finding of "good faith" in respect to his ownership of such names, but is evidence of "bad faith" under the Anticybersquatting Consumer Protection Act ("ACPA"), Pub. L. No. 106-113, 113 Stat. 1501 (1999), codified at Section 43(d) of the Lanham Act, 15 U.S.C. § 1125(d)(1)(B)(i)(III). To hold that Applicant's registration of domain names without more

¹⁷ See Stipulation Regarding Domain Names, appended to Opposer's trial brief as Exhibit 12.

¹⁸ *Id.*

¹⁹ *Id.*

constituted the basis for an assertion of priority would therefore violate the policy against the reservation of rights in unused trademarks embodied in the Trademark Law Revision Act of 1988.²⁰

III. Opposer's First Use of the Disputed Mark At Least As Early As March 31, 2006, Precedes Any Priority Date Lawfully Attributable to the Opposed Application.

Granting every benefit of the doubt to Applicant and assuming for purposes of argument that Applicant had a *bona fide* intent to use the disputed mark when he filed his application on April 20, 2006, the fact remains that Opposer was engaged before then, at least as early as March 31, 2006, in substantial pre-sales advertising, promotion and other activity resulting in the exposure of Opposer's mark to the relevant public. *See* Opposer's trial brief at pp. 47-53 (citing record evidence and authorities).

Applicant attempts to counter this evidence by asserting a priority date based on his alleged first use of the disputed mark in 2005. However, Applicant cannot have it both ways. Either Applicant's claim of priority is based on the assumption of a filing basis under Section 1(a) of the Lanham Act (first use in commerce), or a filing basis under Section 1(b) (intent to use). If a Section 1(a) basis is imputed to the application, then this opposition must be sustained on the grounds that there is no evidence of prior, substantial and continuous commercial use. If, in the alternative, the application is deemed to have a Section 1(b) filing basis, then Applicant's priority date is April 20, 2006, which post-dates the commencement of Opposer's pre-sales activity, not later than March 31, 2006, resulting in the exposure of the disputed mark to Opposer's class of purchaser.

²⁰ Pub. L. No. 100-667, 102 Stat. 3935 (Nov. 16, 1988).

IV. Conclusion

The real issue is whether the Board should sustain the opposition on the grounds of fraud, or should instead sustain the opposition on the grounds that the record fails to support Applicant's claim of priority in the disputed mark. As a matter of principled jurisprudence and the preservation of integrity in the administrative process, Opposer urges the Board to sustain this opposition on the grounds of fraud. Under no rationale, however, should the application be permitted to register. Allowing Applicant's mark to register would hold Opposer to an impossible burden of proof in response to evidence that is by all appearances fabricated and, at best, self-serving and inherently resistant to cross-examination. Failure to sustain this opposition would thereby open the floodgates to similar spurious claims by future applicants, undermining the rule of law in proceedings at the U.S. Patent and Trademark Office.

Request for Oral Argument

Opposer respectfully requests an opportunity for oral argument in this case.

Respectfully submitted,

NATIONSTAR MORTGAGE, LLC



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Exhibit A

From: Patrick Rea [mailto:rea@taylorrealaw.com]

Sent: Tuesday, April 14, 2009 11:52 AM

To: Smith, S. Lloyd

Subject: Nationstar Mortgage v. Ahmad

Lloyd:

Mr. Ahmad has finally come up with a counteroffer to settle this matter. His counteroffer is \$2 million.

Patrick Rea
703-385-3322

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 11, 2011, a copy of the foregoing
OPPOSER'S TRIAL BRIEF was sent by e-mail, and by U.S. mail, first class postage prepaid, to
the following counsel of record for Applicant:

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